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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RALPH COYLE, WARDEN,

Petitioner

vs.

DAVID A. MAPES

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II

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I.B. State Procedural Waiver

Respondent contends that petitioner failed to raise seven of his fifteen claims on direct state appeal, thus he has waived them. Respondent claims petitioner's first (improper *voir dire*), third (ineffective assistance of trial counsel), fourth (lack of meaningful appellate review of death sentence), seventh (improper jury poll), twelfth (inconsistent jury verdicts), thirteenth (prosecutorial misconduct), and fifteenth (denial of right to counsel at arraignment) grounds for relief have been waived by reason of a state procedural waiver rule.

1. Grounds 13 and 15

Petitioner concedes that he has waived grounds 13 (prosecutorial misconduct) and 15 (denial of right to counsel at arraignment) and will not prosecute them further. Petitioner's Traverse (hereafter Traverse), at 63.

2. Grounds 1, 3, 4 and 7

Petitioner contends these four grounds have not been waived. The Court of Appeals' decision on petitioner's post-conviction petition determined that grounds 1, 3, 4 and 7 were barred by *res judicata* for failure to raise them on direct appeal, RX T, at 5-6, 8-10. Where a state court judgment on a particular claim rests on independent and adequate state procedural grounds, the federal court may not review it in a federal habeas petition, absent a showing of cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72 (1977). A state procedural ground is established when the last state court rendering a decision on a constitutional claim states that its judgment rests on a state procedural bar. *Harris v. Reed*, 489 U.S. 255 (1989).

The Supreme Court of Ohio, *sua sponte*, dismissed the post-conviction appeal therefrom "for the reason that no substantial constitutional question exists." RX X. No further reasoning was given.

With regard to such formulary orders:

> State procedural bars are not immortal, however; they may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available. *See Harris*, 489 U.S. at 262....
>
> The problem we face arises, of course, because many formulary orders are not meant to convey **anything** as to the reason for the decision. Attributing a reason is therefore both difficult and artificial. We think that the attribution necessary for federal habeas purposes can be facilitated, and sound results more often assured, by applying the following presumption: where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion "fairly appear[s] to rest primarily upon federal law," *Coleman v. Thompson*, 115 L.Ed.2d 640, 659 (1991)]... we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.

Ylst v. Nunnemaker, 111 S.Ct. 2590, 2593-94 (1991) (emphasis in original).

Thus, under *Ylst*, the court of appeals decision was the "last reasoned decision," and it denied grounds 1, 3, 4 and 7 solely on the basis of state procedural default. The Supreme Court dismissal was a "later unexplained order" under *Ylst*.

As a result, federal habeas review of grounds 1, 3, 4 and 7 is barred, unless petitioner can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 111 S.Ct. 2546, 2565 (1991).

Concerning his fourth ground for relief, petitioner claims "it was impossible for petitioner to raise this issue on direct appeal when the violation first occurred during the direct appeal process. The issue was raised in the post-conviction petition and the state courts were given a full and fair opportunity to address the issue, but declined to do so." Petitioner's Traverse, at 75. This is merely an argument that the Ohio Court of Appeals was wrong in concluding there was a state procedural waiver. It is not the federal court's duty to review a state court determination that a state procedural default has occurred. *See Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988) ("The federal habeas court does not act as an additional state appellate court to review a state court's interpretation of its own law or procedure.") Petitioner's fourth ground for relief has been waived since he has not established cause or prejudice.

Petitioner asserts that ineffective assistance of appellate counsel constituted cause and prejudice concerning his first, third, and seventh grounds for relief, because counsel was

ineffective for failing to raise these claims on direct appeal. The Supreme Court has recently held:

> *Murray v. Carrier* considered the circumstances under which attorney error constitutes cause. *Carrier* argued that his attorney's inadvertence in failing to raise certain claims in his state appeal constituted cause for the default sufficient to allow federal habeas review. We rejected this claim, explaining that the costs associated with an ignorant or inadvertent procedural default are not less than where the failure to raise a claim is a deliberate strategy: it deprives the state courts of the opportunity to review trial errors. When a federal habeas court hears such a claim, it undercuts the State's ability to enforce its procedural rules just as surely as when the default was deliberate. 477 U.S., at 487.... We concluded: "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, ... we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Id.*, at 488....
>
> * * *
>
> We explained clearly that "cause" under the cause and prejudice test must be something **external** to the petitioner, something that cannot fairly be attributed to him: "[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." 477 U.S., at 488.... For example, "a showing that the factual or legal basis for a claim was not reasonably available to counsel, ... or that 'some interference by officials' ...

> made compliance impracticable, would constitute cause under this standard." *Ibid. See also id.*, at 492, 91 L.Ed.2d 397, 106 S.Ct. 2639 ("[C]ause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim").
>
> Attorney ignorance or inadvertence is not "cause" because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must "bear the risk of attorney error." *Id.*, at 488... Attorney error that constitutes ineffective assistance of counsel is cause, however.... [I]t is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, i.e., "imputed to the State."

Coleman, 111 S.Ct. at 2566-67 (emphasis in original).

Under *Murray* it must be determined if appellate counsel rendered ineffective assistance for failing to raise petitioner's first, third, and seventh grounds for relief. It is concluded that appellate counsel was not ineffective for failing to raise these grounds on appeal. Since the reasoning for this conclusion involves significant consideration of the merits of the underlying issue, the reasoning is set forth in sections II.E. and III.B. (Ground 1), III.C. (Ground 3), and III.E. (Ground 7), *infra*.

3. Ground 12

Respondent contends that petitioner has waived his twelfth claim concerning inconsistent jury verdicts because he failed to fairly present it as a constitutional claim before the state courts. Petitioner did not raise the issue in constitutional terms in his brief on direct appeal, RX G, K,

nor did the Appellate Court or Supreme Court discuss it in terms of a constitutional issue. RX I, pp. 17-19; *Mapes*, 19 Ohio St.3d at 112-13.

A claim is not fairly presented if the constitutional issue was not presented, even if the underlying facts were presented. *Anderson v. Harless*, 459 U.S. 4 (1982). Petitioner did not fairly present this claim to the state courts as a federal constitutional claim, see *Franklin v. Rose*, 811 F.2d 322, 326 (6th Cir. 1987). Nonetheless, since he has already taken a direct appeal, he has exhausted state remedies. *Keener v. Ridenour*, 594 F.2d 581 (6th Cir. 1979). He cannot now raise the constitutional claim in Ohio courts, thus he has committed a state procedural default and waived it under *Sykes, supra*; see *Leroy v. Marshall*, 757 F.2d 94 (6th Cir. 1983), *cert. Denied sub nom., Leroy v. Morris*, 474 U.S. 831 (1985).

To summarize, seven grounds must be denied by reason of state procedural waiver. They are grounds 1, 3, 4, 7, 12, 13 and 15.

II. The Guilt Phase

A. Denial of Counsel (Ground 15)

Petitioner contends he was not represented by counsel at his arraignment, which was a denial of due process. Petitioner concedes he waived this issue, see section I.B., *supra*.

B. Prejudicial Voir Dire (Ground 14)

Petitioner contends he was denied due process and an impartial jury by reason of the trial court's refusal to grant the defense request for individual sequestered voir dire. The court conducted the voir dire in a group session with all

members of the venire panel present. Thus, each member was present at the questioning of all other members. The voir dire included "death qualification" questions pursuant to *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

Petitioner contends the jurors were desensitized by the group[1] voir dire process. He points out that in addition to the death qualification questions, numerous potential jurors stated they or their families had been victims of crime, and argues this resulted in a jury that was neither fair nor impartial. SAP at 95-97.

This issue was considered and denied in *Byrd v. Armontrout*, 686 F.Supp. 743, 763 (E.D. Mo. 1988), *aff'd* 880 F.2d 1 (8th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990):

> [S]equestered individual death qualifying voir dire is not constitutionally dictated. The death qualifying voir dire may be conducted in groups, and the fact that it is conducted in groups does not, without more, result in a[ ] [ ]partial jury. *Trujillo v. Sullivan*, 815 F.2d 597, 606-07 (10th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 296, 98 L.Ed.2d 256 (1987); *McCorquodale v. Balkcom*, 721 F.2d 1493, 1495-1496 (11th Cir. 1983), *cert. denied*, 466 U.S. 954, 104 S.Ct. 2161, 80 L.Ed.2d 546 (1984); *see Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (Upholding death penalty based upon a death qualified jury where individual jurors

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[1] The transcript indicates the twelve-member jury was chosen from the first panel in about three days. Voir dire began on the afternoon of Monday, May 2, Tr. 412, and ended on the afternoon of Thursday, May 5, Tr. 1125. Alternates were selected from a new panel with the twelve selected jurors absent. Tr. 1174-76.

were death qualified in the presence of the other jurors. 477 U.S. at 176-78, 106 S.Ct. at 2469-71). Further, assuming that group voir dire death qualification does result in a more "conviction-prone" jury, that fact would not mean that petitioner was denied his right to a jury selected from a fair cross-section of the community, *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 1764-1766, 90 L.Ed.2d 137 (1986), or his right to an impartial jury. *Id.* 106 S.Ct. at 1767-1770.

Petitioner relies on one authority, *Hovey v. Superior Court of Alameda County*, 28 Cal. 3d 1, 616 P.2d 1301 (Cal. 1980), which was distinguished in *Trujillo v. Sullivan*, 815 F.2d 597 (10th Cir.), *cert. denied*, 484 U.S. 929 (1987), the court noting that *Hovey* did not rely on the United States Constitution. *Trujillo* did note there "may be a case where *en masse* death-qualifying *voir dire* may be so egregious and may taint the jury that the process denies the defendant his constitutional right to an impartial jury." *Id.* at 607. Such a case was not present in *Trujillo*; *see also*, *McCorquodale v. Balkcom*, 721 F.2d 1493 (11th Cir. 1983), *cert. denied*, 466 U.S. 954 (1984); *Jones v. Kemp*, 706 F.Supp. 1534 (N.D. Ga. 1989), nor does the voir dire herein present such a case.

After the trial judge questioned each potential juror, both parties were permitted to examine, with few limitations on the questions asked. Petitioner argues that the venire was tainted by several stories of violent crimes. Five of those were in the presence of the original venire, from which the 12-member jury was selected. Tr. 445-447, 449, 947, and 1044-45. In one instance, the court allowed questioning of a prospective juror in chambers to avoid this possibility. Tr. 952-956. A review of the transcript reveals there were no prejudicial or egregious comments made before the rest of the venire. The voir dire gave both sides the opportunity to

discover bias or prejudice and comported with due process. *Trujillo, supra*, at 607.

II.C. Biased Jury (Ground 6)

Petitioner contends that the court excluded "all principled jurors" because of their beliefs concerning the death penalty, in violation of the Fifth, Sixth, and Fourteenth Amendments. Petitioner argues that the "death qualification" voir dire resulted in a jury more prone to convict, thus not impartial, nor a fair cross section of the community. Petitioner contends that because Ohio bifurcates the guilt and sentencing phases, a venire person's views on the death penalty are irrelevant with respect to the guilt phase of the trial. SAP at 76-82.

Lockhart v. McCree, 476 U.S. 162 (1986), rejects all of petitioner's arguments. In that case, the petitioner, McCree, argued that the removal of death qualified jurors prior to the guilt phase of a bifurcated capital trial violated the Sixth and Fourteenth Amendments of the Constitution. The Court rejected the 15 studies[2] McCree used to support his contention that the jury was not impartial, finding them insufficient to make a constitutional claim. The Court also stated:

> Having identified some of the more serious problems with McCree's studies, however, we will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that "death qualification" in fact produces juries somewhat more "conviction-prone" than non-death-qualified" juries. We hold, nevertheless, that

[2] Some of the studies advanced as evidence in the *Lockhart* case are the same that petitioner seeks to introduce here, *i.e.*, studies by Ellsworth and Haney.

the Constitution does not prohibit the States from "death-qualifying" juries in capital cases.

The Eighth Circuit ruled that "death qualification" violated McCree's right under the Sixth Amendment, as applied to the States via incorporation through the Fourteenth Amendment, ... to a jury selected from a representative cross sec on of the community. But we do not believe that the fair-cross-section requirement can, or should, be applied as broadly as that court attempted to apply it. We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.... The limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly "representative" petit jury.... We remain convinced that an extension of the fair-cross-section requirement to petit juries would be unworkable and unsound, and we decline McCree's invitation to adopt such an extension.

But even if we were willing to extend the fair-cross-section requirement to petit juries, we would still reject the Eighth Circuit's conclusion that "death qualification" violates that requirement. The essence of a "fair-cross-section" claim is the systematic exclusion of "a 'distinctive' group in the community." ...In our view, groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the "*Witherspoon*-excludables" at issue here, are not "distinctive groups" for fair-cross-section purposes.

* * *

Our prior jury-representative cases, whether based on the fair-cross-section component of the Sixth Amendment or the Equal Protection Clause of the Fourteenth Amendment, have involved such groups as blacks, ...women, ...and Mexican-Americans.... The wholesale exclusion of these large groups from jury service clearly contravened all three of the aforementioned purposes of the fair-cross-section requirement. Because these groups were excluded for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case, the exclusion raised at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community. In addition, the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an "appearance of unfairness." Finally, such exclusion improperly deprived members of these often historically disadvantaged groups of their right as citizens to serve on juries in criminal cases.

The group of "*Witherspoon*-excludables" involved in the case at bar differs significantly from the groups we have previously recognized as "distinctive." "Death qualification," unlike the wholesale exclusion of blacks, women, or Mexican-Americans from jury service, is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at

both the guilt and sentencing phases of a capital trial. There is very little danger, therefore, and McCree does not even argue, that "death qualification" was instituted as a means for the State to arbitrarily skew the composition of capital-case juries.

Furthermore, unlike blacks, women, and Mexican-Americans, "*Witherspoon*-excludables" are singled out for exclusion in capital cases on the basis of an attribute that is within the individual's control. It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. Because the group of "*Witherspoon*-excludables" includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, "death-qualification" hardly can be said to create an "appearance of unfairness."

* * *

In sum, "*Witherspoon*-excludables," or for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair-cross-section requirement. See *Lockett v. Ohio*, 438 U.S. 586, 597 (1978) ("Nothing in *Taylor*, however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the, trial judge"). It is for this reason that we conclude that

> "*Witherspoon*-excludables" do not constitute a "distinctive group" for fair-cross-section purposes, and hold that "death qualification" does not violate the fair-cross-section requirement.

Id. at 173-77 (citations omitted).

Concerning McCree's assertion that the jury was not impartial because it was "slanted" in favor of conviction due to the absence of "*Witherspoon*-excludables," the Court said:

> McCree's "impartiality" argument apparently is based on the theory that, because all individual jurors are to some extent predisposed towards one result or another, a constitutionally impartial jury can be constructed only by "balancing" the various predispositions of the individual **jurors.** Thus, according to McCree, when the State "tips the scales" by excluding prospective jurors with a particular viewpoint, an impermissibly partial jury results. We have consistently rejected this view of jury impartiality, including as recently as last Term when we squarely held that an impartial **jury** consists of nothing more than "**jurors** who will conscientiously apply the law and find the facts." *Wainwright v. Witt*, 469 U.S. 412, 423 (1985) (emphasis added); see also *Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it"); *Irvin v. Dowd*, *supra*, at 722 ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors").
>
> The view of jury impartiality urged upon us by McCree is both illogical and hopelessly impractical. McCree characterizes the jury that convicted him as "slanted" by the process of "death qualification." But

> McCree admits that exactly the same 12 individuals could have ended up on his jury through the "luck of the draw," without in any way violating the constitutional guarantee of impartiality. Even accepting McCree's position that we should focus on the **jury** rather than the individual **jurors**, it is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a state ordained process, yet impartial when exactly the same jury results from mere chance. On a more practical level, if it were true that the Constitution required a certain mix of individual viewpoints on the jury, then trial judges would be required to undertake the Sisyphean task of "balancing" juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on. Adopting McCree's concept of jury impartiality would also likely require the elimination of peremptory challenges, which are commonly used by both the State and the defendant to attempt to produce a jury favorable to the challenger.

Id. at 177-79 (emphasis in original).

Petitioner's claim is without merit.

II.D. Trial Judge Bias (Ground 8)

Petitioner asserts that he was denied a fair trial because the trial judge was biased against him. Unless they amount to constitutional violations, prejudicial comments and conduct by a judge in a criminal trial is not subject to collateral attack following conviction. *Brinlee v. Crisp*, 608 F.2d 839, 852-53 (10th Cir. 1979), *cert. denied*, 444 U.S. 1047 (1980). The test is whether the errors alleged could have rendered the trial fundamentally unfair. To violate petitioner's constitutional

right to a fair trial the intervention by a trial judge in the conduct of a criminal trial would have to reach a significant extent and be adverse to the petitioner to a substantial degree. *McBee v. Grant*, 763 F.2d 811, 817 (6th Cir. 1985).

Petitioner also claims that appellate counsel was ineffective for failing to raise the issue on appeal, see section II.F, *infra*. While appellate counsel failed to raise the issue of trial judge bias on direct appeal, petitioner's new counsel raised it in the post-conviction petition (RX P, p.117 ff.). The trial court held that petitioner had committed a state procedural waiver in failing to raise the issue on direct appeal (RX Q, p.9). The Ohio Court of Appeals considered the issue on the merits. (RX T) That court noted in part that petitioner "contends the trial court was biased and the facts needed-to support this charge exist outside the record." (RX T, p.12), and further that petitioner stated said facts "did not become known until after the direct appeal" (*ibid*). The court considered the issue on the merits; however, the court concluded that "appellant [petitioner] has not provided this court with any facts that would suggest bias." (*Id.*, p.13) Under these circumstances, appellate counsel was not ineffective.

Petitioner states there is evidence of bias outside the record and seeks an evidentiary hearing thereon. Petitioner does not have a right to a hearing based on no more than allegation. Whether to hold a hearing depends on the existence of a factual dispute, the strength of the proffered evidence, the thoroughness of prior proceedings, and the nature of the state court determination. *Pagan v. Keane*, 984 F..2d 61, 64 (2d Cir. 1993). Petitioner has failed to show a hearing should be held, but he has submitted two affidavits which must be considered further.

Since 1990, after exhausting state appeals, petitioner claims to have obtained "new evidence" of bias. On

September 11, 1991, petitioner filed his traverse to the return of writ. In support of his claim of trial judge bias, he submitted the unsigned affidavits of June Chatman, one of the 1983 jurors in petitioner's case, and her husband. (Traverse, at 56-57) On September 20, petitioner moved to amend the traverse by filing their signed affidavits. The affidavits had been signed on September 17, 1991.

In her affidavit, June Chatman contends she was pressured by the trial judge and other jurors to reach a verdict of guilty. The judicial pressure came from the judge's attempt to intimidate her by discounting her health complaints and refusing to allow her to seek medical attention as requested. She also felt the trial judge was biased against petitioner, which affected the judge's rulings during the trial and his treatment of the jurors. She states she signed the death verdict forms only because of pressure from the trial judge and other jurors, as well as fear of her own health. (See affidavit of June Chatman attached to petitioner's "Motion to Amend Traverse.") June Chatman's husband stated that he was called by the trial judge the evening of June 3, the evening before the last date his wife served as a juror, and asked him why his wife was not agreeing to go along with the rest of the crowd and holding out from convicting petitioner. (See affidavit of Charles Chatman, attached to petitioner's "Motion to Amend Traverse.")

Initially, it is noted that much of the June Chatman affidavit is not admissible evidence, under Rule 606(b) of the Ohio and Federal Rules of Evidence. Moreover, Mr. Chatman does not allege, nor does Mrs. Chatman allege, that he informed his wife of the trial judge's comments to him and Mrs. Chatman does not state that her ultimate decision on the verdict would have been different but for the alleged pressure from the trial judge. Her claim that the trial judge "discounted" her health complaints is belied by the record,

which shows-that on June 3, 1983, the trial judge suspended the trial and ordered that she be taken to the hospital to tend to her medical problems. Since the jury was sequestered, it was necessary to send court personnel with her to the hospital. (Tr. 4218-20)

Respondent contends that petitioner has, through a state procedural bar, waived his right to have this court consider the Chatman affidavits because petitioner failed to present them to the Ohio courts. To be entitled to have the Chatman affidavits considered, petitioner must show cause for, and demonstrate actual prejudice from, his failure to present them in the Ohio courts. *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992). This rule applies to situations such as the present in which no evidentiary hearing was held in the state court. See *U.S. ex rel. Free v. Peters*, 806 F.Supp. 705, 710-11 (N.D. Ill. 1992) (adopting the report and recommendation of the magistrate judge, at 818 F.Supp. 1098, 1114 (N.D. Ill. 1992)).

Establishing cause ordinarily requires a showing of some external impediment which prevented counsel from obtaining the evidence. *Tamayo-Reyes*, 112 S.Ct. at 1720-20 n.5; *U.S. ex rel. Free*, 806 F.Supp. at 710. One aspect of cause is whether the new evidence could have been discovered earlier in the exercise of due diligence, *Cornell v. Nix*, 976 F.2d 376, 380 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1820 (1993).

June Chatman has been known to petitioner since 1983 when she was a juror in his case. Nonetheless, petitioner did not obtain the Chatman affidavits for eight years, until after he filed the petition *sub judice*. Petitioner has not shown that due diligence would not have obtained the Chatman affidavits in time to present them to the Ohio courts during the approximate seven years his case was before an Ohio court. He has failed to establish cause.

The remaining evidence of bias needs little discussion. Petitioner-makes numerous citations to the record in support of his claim of bias. SAP 49-51. None of those citations show bias. Most reflect court rulings which were adverse to petitioner.

Petitioner also complains that the judge stated "halfway through trial that the evidence is 'overwhelming'" against petitioner. The court made this observation in chambers on a Rule 29 motion for acquittal, when finding there was sufficient evidence of guilt for the case to go to the jury. Tr. 3431-39. His ruling was correct.

Petitioner's characterization of Judge Kilbane's statement to the jury about the costs of capital cases as a "complaint" does not show bias, particularly since he corrected himself. (Tr. 404-05)

As discussed more fully elsewhere, the *voir dire* was not prejudicial, the jury poll was not improper, and jury instructions in this case were not inappropriate (with one exception in the sentencing phase). The judge's rulings and proceedings therein do not indicate bias.

Petitioner notes there were many unrecorded side bar conferences which he claims occurred under "suspicious circumstances." Nothing suggests the side bar conferences were "suspicious."

Petitioner contends the judge sequestered the jury after the guilt phase although the jury had acquitted petitioner of the aggravating circumstances tried to it. To dismiss the jury pending the court's determination of the remaining claim of an aggravating circumstance (the prior New Jersey murder), would

have been premature since Ohio law requires the same jury convict and sentence a capitally charged defendant. *State v. Penix*, 32 Ohio St. 3d 369 (1987) (syllabus). Petitioner has failed to establish the trial judge was biased.

II.E. Ineffective Assistance of Trial Counsel (Ground 1)

Petitioner's first ground, claiming ineffective assistance of trial counsel, was not appealed, thus this issue will be considered in the context of whether appellate counsel was ineffective for failing to raise it. See section I.B., *supra*. The test of effectiveness for appellate and trial counsel follows the test in *Strickland v. Washington*, 466 U.S. 668 (1984). For appellate counsel, the prejudice component of *Strickland* requires a showing of reasonable probability that the result of the appeal would have been different. *Smith v. Jago*, 888 F.2d 399, 405, n.1 (6th Cir. 1989), *cert. denied sub nom., Smith v. Alexander*, 495 U.S. 961 (1990).

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions the accused has the right to the effective assistance of counsel. *Strickland, supra*, adopted a two part standard for evaluating claims of ineffective assistance of counsel. First, "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Second, he must show counsel's deficiencies "prejudiced the defense." *Id.* at 698-88. The "prejudice" requirement is based on the Court's conclusion that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

Strickland notes it is not necessary to examine the first part (whether counsel's performance was deficient) if examination of the second part (whether counsel's performance was prejudicial) settles the issue. *Id.* at 697. In the second part, the court must inquire whether petitioner has shown there is a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id.* at 694. Thus (on the guilt phase), "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

The totality of the evidence before the jury must be considered. Some errors of counsel might have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, while others will have had an isolated, trivial effect. A verdict only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking account of the effect of the errors, "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* at 695-96.

The guilty verdict in this case was strongly supported by the evidence. There were eyewitnesses who saw petitioner commit the crime. John Hovekamp positively identified Mapes as being at the crime in possession of a shotgun. Tr. 2454. Ron Rucci identified the defendant as having been in the bar the night before the crime. Tr. 2151. Rucci described the murderer as 5'8" to 5'-10," with a mustache and wearing a leather jacket, Tr. 2144, as did Mike Williams, Tr. 2217. At the time of the robbery, Mapes was wearing a bluish-black leather jacket. Tr. 2331. Finally,

Rodney Newton, petitioner's co-defendant, pled guilty and testified that Mapes approached him with the idea of burglarizing Chaps. Tr. 2311-17. Mapes told Newton that he needed the money. Tr. 2328. Mapes had a shotgun. Tr. 2349-52. During the burglary, Mapes gave the orders and shot the victim. Tr. 2354-56. When they returned to Mapes' apartment, Mapes put shotgun shells down the drain, and cleansed himself with grapefruit, saying that it removed evidence of firing the gun. Tr. 2364, 2370-73.

Other witnesses implicated Mapes. Hiawatha Mapes, wife of David Mapes and the only defense witness, admitted that Mapes owned a sawed-off shot gun that he carried around in a beige gym bag. Tr. 3484.

Michael Reese testified that Mapes tried to recruit him to rob Chaps weeks before the crime. Tr. 2503-04, 2552-53. After the crime, Mapes told him that Newton's testimony that Mapes shot Allen could hurt him, and that Mapes told him he wished it had not happened that way and wished the victim had not made that move. Mapes also told him what he and Newton did after the robbery. Tr. 2518-28.

Christine Alexander testified that Mapes brought a bag containing a gun up to her apartment, and that he and others were discussing committing a robbery. Tr. 2752-58.

Hayward Chambers testified that Mapes had a bag with a shotgun in it, and that Mapes had told him he was going to get money out of video games at Chaps. Tr. 2793-95. After the crime, Mapes talked about getting rid of some shells, and said he had gotten into trouble and needed to leave town. Tr. 2805-07. Mapes told him that "a man lift his head up and he dropped him." Tr. 2808-09, 2812. Mapes said that if he had known Newton was scared held have killed him too, Tr. 2813, and that if anyone talked and he found out, "they'd get the same." Tr. 2816. John Clark, Mapes, landlord, testified

that Mapes called him and learned that the police had found shot gun shells under Mapes' floor. Tr. 2869-71.

Police officers provided further evidence against Mapes. Detective Kunz testified that a pry bar or crowbar and screwdrivers were found at Mapes' apartment. Tr. 2948-50. The prybar was established by Detective Sergeant Reynolds, from its markings, as the tool used in the crime. Tr. 3353-54. The officers found shotgun shells underneath Mapes' floor, Tr. 3138-47, which were established by Detective Reynolds to be the same type, gauge and weight as that used to kill Allen. Tr. 3349-51.

Mapes made inconsistent and uncorroborated statements to the police regarding his involvement. He first denied that he owned a shotgun and that he was not in town when the crime was committed. Tr. 3134-35. After he learned he had been seen in town the day of the robbery, and that the officers had found shells under his floor, he stated that he did own a shotgun, that he fired it on New Year's Eve, and that his cat had knocked the shells down the drain. Tr. 3149-52, 2974-75. Mapes also admitted to some involvement in the crime, stating that he, Chambers, Newton, and an individual named "Red" had planned on burglarizing Chaps, but Chambers did not actually participate. Mapes said that Newton and "Red" entered Chaps while he acted as a lookout, and that he didn't learn there was a murder until later. Tr. 2975; 3263-65. Mapes described this individual named "Red," but the police could find no evidence that any such person existed. Tr. 2980-82. Mapes' statement as to where and from whom he got the shotgun did not check out upon further investigation. Tr. 2981-83.

Mapes did not testify at the guilt phase. Only one witness, his wife, testified for the defense (Tr. 3442-3500). Her testimony was not appreciably helpful to petitioner's case.

Since the conviction was based on strong evidence, the probability that any alleged error of counsel was prejudicial is greatly reduced.

> Petitioner alleges four counsel errors occurred during the guilt phase (grounds titled 1(A) through 1(D) by petitioner).

Ground 1(A) alleges that counsel failed to properly investigate before trial. Petitioner does not claim or identify any exculpatory evidence which would have been unearthed.

Ground 1(B) claims that counsel failed to raise and preserve substantive issues through proper motions practice, and incompetently handled those he did make. Petitioner does not-identify most of the motions he claims should have been filed, much less show they would have been meritorious and what impact they would have had if granted. Similar observations apply to motions that were made.

Ground 1(C) claims that counsel was incompetent during *voir dire*. As noted in section II.A, *supra*, the *voir dire* was constitutional. Petitioner's contention that the prospective jurors were confused by counsel and the court is not supported by the cited portions of the transcript, nor by the record as a whole. The trial court gave a reasonable explanation to the jury of the guilt and sentencing phases of the trial and the jury's role therein.

Ground 1(D) claims that counsel's trial strategy was insufficient, he was rude and abusive, and he failed to object to improper instructions (*e.g.*, that the firearm specification was an "aggravating circumstance") or propose appropriate ones (*e.g.*, a lesser included offense charge).

Petitioner has failed to show that prejudice resulted from counsel's strategy. Petitioner's citations to the record at times are incorrect or reflect the innocuous. Taken together, they fail to show (in all but a few instances which have not been shown to have had an adverse impact) that counsel was rude and abusive, as opposed to disagreeing with the court or counsel.

As to the lesser included offense argument, the evidence leaves no reasonable probability that the outcome would have been different had the jury been presented with a lesser included offense. *See Harris v. United States*, 938 F.2d 882, 883 (8th Cir. 1991).

Petitioner's argument that trial counsel was ineffective because he failed to object to certain jury instructions is without merit for the reasons discussed in section II.F., *infra*.

To summarize, appellate counsel was not ineffective for failing to raise the issue of ineffective assistance of trial counsel at the guilt phase. Petitioner has not established cause and prejudice for his state procedural waiver of this claim.

II.F. Ineffective Assistance of Appellate Counsel (Ground 2)

Petitioner alleges ineffective assistance of appellate counsel in his second ground. There is a constitutional right on direct appeal to effective assistance, *Evitts v. Lucey*, 469 U.S. 387 (1985). Holding an evidentiary hearing on this issue is the exceptional case, *Gray v. Greer* 800 F.2d 644, 647 (7th Cir. 1986), and is not necessary herein.

1. Ineffective Assistance of Trial Counsel

Failure to raise this claim on appeal has been previously discussed and found to be without merit.

2. Jury Instructions

Petitioner contends appellate counsel should have challenged certain instructions on appeal because although not objected to, they constituted plain error. Plain error under Ohio Criminal Rule 53(B) is to be found under exceptional circumstances and "only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St. 2d 91, 97 (1979). An improper instruction does not constitute plain error unless "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Durkin*, 66 Ohio St. 2d 158, 161 (1981).

Analysis of the challenged instructions reveals that they did not constitute plain error nor do they reflect ineffective assistance of counsel.

As noted earlier, petitioner was indicted on two counts of aggravated murder, pursuant to Ohio Revised Code §2903.01(B). Count one charged that the murder occurred during the course of an aggravated robbery Count two charged the murder occurred during the course of an aggravated burglary. Germane to petitioner's claim, each of the two aggravated murder counts had four identical specifications. Three of those specifications were death penalty specifications. The fourth specification was a firearm specification which did not constitute a death penalty specification.

The jury was to consider only two of the death penalty specifications, as well as the gun specification. The death penalty specification charging a prior murder conviction was tried to the judge, pursuant to petitioner's waiver of a jury trial.

The trial court erroneously instructed the jury they would be deliberating on three, rather than two, death penalty specifications of aggravating circumstances, identifying the gun specification as an aggravating circumstance (Tr. 3686-87):

> Now, ladies and gentlemen, if you find the defendant guilty of aggravated murder, I have prepared for your consideration a separate and distinct jury form [*sic*] for each count. I have prepared two for each count. You will use the printed form if you find the defendant guilty of aggravated murder. And it is your duty to then deliberate and further decide the additional factual questions, that is, the three specifications of aggravating circumstances set forth in Count No. I of the indictment the three specifications of aggravating circumstances in Count II of the indictment.

The court subsequently instructed the jury as follows (Tr. 3700-01):

> Now, the State Specification No. 3 in both counts I and II charges that defendant, David Mapes, had "a firearm on or about his person or under his control while committing the offenses charged in Count I and Count II of the indictment," that is aggravated robbery and aggravated burglary.
>
> * * *
>
> If you find that the State of Ohio has proven beyond a reasonable doubt all the essential elements of the aggravating circumstances of Specification No. 3 in both Counts I and II, then your finding must be guilty as to Specifications No. 3 in Counts I and II.

While the trial court incorrectly instructed that the firearm specification charged an aggravating circumstance, petitioner has failed to show that petitioner was prejudiced. The jury found petitioner not guilty of the two death penalty specifications it considered. Finding petitioner guilty of the gun specification did not change the outcome of the guilt phase.

Petitioner also contends the instructions on distinguishing between whether petitioner was the principal offender, as opposed to an accomplice, in the context of the aggravating circumstances, constituted plain error. After instructing the jury on the elements of aggravated murder, the judge turned to death specification Nos. 1 and 2. He informed the jury that it had to consider two issues, "Your first issue is to decide whether or not David Mapes is the principal offender or whether he was an accomplice or an aider and abettor." (Tr. 3689) Petitioner objects to the following instructions concerning this issue (Tr. 3690):

> If you find beyond a reasonable doubt that David Mapes was not the principal offender, then you would consider whether or not David Mapes was an accomplice or an aider and abettor only.

This instruction dealt with specification No. 1. The court gave essentially the same instruction concerning specification No. 2 (Tr. 3696).

Petitioner contends these instructions constituted a due process violation in that they required the jury to find defendant was not the principal offender beyond a reasonable doubt before deliberating on whether he was an accomplice. Since the jury found petitioner was not guilty of specifications 1 and 2, petitioner has not established either

plain error or prejudice, even assuming the instructions were erroneous.

Petitioner also contends that counsel was ineffective on direct appeal for failing to raise the claim of trial judge bias. This issue has previously been discussed in section II.D., *supra*. That discussion is applicable to the ineffective assistance claim in the context of Ohio law.

Petitioner contends inadequate briefing of two claims made on appeal. This claim is without merit.

In summary, petitioner has failed to show ineffective assistance of appellate counsel with reference to issues petitioner claims existed during the guilt phase which should have been, but were not, raised on appeal.

II.G. Prosecutorial Misconduct (Ground 13)

Petitioner concedes he waived this issue, section I.B., *supra*.

II.H. Inconsistent Jury Verdicts (Ground 12)

Petitioner asserts that the jury verdicts on counts one and two, finding defendant guilty of aggravated murder but not guilty of the specifications, are inherently inconsistent, which renders the death penalty a violation of the Eighth Amendment. It was noted previously, section I.B., *supra*, that this issue was waived.

II.I. Limiting the Evidence (Ground 9)

The guilt phase was bifurcated between a jury trial and a non-jury trial. Petitioner waived a jury trial on one of the death penalty specifications, specification 4, which charged

that petitioner had previously been convicted of a murder, of which an essential element was the purposeful killing of another. The judge heard the evidence on specification 4 after the jury returned its guilty verdict, and ruled that the state had proved the specification beyond a reasonable doubt. Thus, petitioner became eligible for the death penalty under Ohio Revised Code §2929.04(A)(5). Petitioner raises two issues in relation to the judge's verdict.

The prior murder conviction specification was based on the evidence that showed that approximately eleven years previously, on May 31, 1972, petitioner pled *non vult* to a charge of murder in the State of New Jersey. Petitioner contends the trial court constitutionally erred in refusing to permit extrinsic evidence regarding petitioner's *non vult* plea. He contends that under *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188 (1987) , a conviction on a *non vult* plea is subject to a motion to strike for unreliability.

Ramseur holds that a defendant can attack the reliability of a prior conviction based upon a *non vult* plea, but only under certain limited circumstances:

> We therefore will allow, under limited circumstances, an attack on a conviction resulting from such a *non vult* plea. We limit those circumstances to the situation in which the *non vult* plea was entered at a time when its acceptance eliminated the possibility of a death sentence, and in which the record - usually of the proceedings at the time of the plea - suggests a realistic possibility that defendant did not commit murder. For instance, in this very case the *non vult* plea insulated defendant from the death penalty, and the plea proceedings, including defendant's statement of his version of the homicide, suggested the possibility of manslaughter. Under those circumstances, the trial court, upon

> motion by the defense, should conduct a preliminary hearing ... concerning the reliability of the prior conviction.

Id. at 278-79, 524 A.2d at 266.

Petitioner contends the trial court should have allowed him to present evidence as to the reliability of his plea because he received a sentence more appropriate to a manslaughter conviction than a murder conviction. SAP at 87. However, *Ramseur* requires two criteria. The second criterion requires that petitioner entered his *non vult* plea when its acceptance eliminated the possibility of a death sentence. He cannot prove this second criterion.

At the time petitioner entered his *non vult* plea in May of 1972, the death penalty statute in New Jersey had been declared unconstitutional on January 17, 1972 in *State v. Funicello*, 60 N.J. 60, 286 A.2d 55, *cert. denied sub nom., New Jersey v. Presha*, 408 U.S. 942 (1972). *Funicello* not only held the New Jersey death penalty statute unconstitutional, it also ruled the maximum sentence for murder in the first degree was life imprisonment. From January 17, 1972 to 1982, when a new death penalty statute was passed, New Jersey had no death penalty provision. See *State v. Davis*, 116 N.J. 341, 371-72, 561 A.2d 1082, 1097 (1989); *Ramseur*, at 203.

Since petitioner's *non vult* plea in 1972 did not eliminate the possibility of a death sentence, he was not entitled to contest the reliability of that plea in 1983. *See State v. Coyle*, 119 N.J. 194, 238, 574 A.2d 951, 973 (1990) ("[T]he jury can consider [defendant's] 1974 *non vult* plea to murder [as] an aggravating factor... [T]here can be little doubt about the reliability of [defendant's *non vult*] plea. Defendant did not enter the plea to insulate himself from a possible death

sentence, because the capital-punishment statute was not on the books at that time.")

II.J. Improper Reliance Upon Prior *Non Vult* Plea (Ground 10)

Petitioner contends that the trial court's use of the *non vult* plea as proof of the specification was contrary to Ohio Rule of Evidence 410 and Rule 11(b)(2) of the Ohio Rules of Criminal Procedure, thus he was denied due process and equal protection of the law.

To the extent petitioner seeks relief based on a violation of state law he has not stated a cognizable federal habeas corpus claim, since habeas claims must be based on the "Constitution, laws or treaties of the United States, 28 U.S.C. Section 2241." *Rose v. Hodges*, 423 U.S. 19, 21 (1975). Federal courts must defer to the state court's interpretation of its own rules, and not "act as an additional state appellate court to review a state court's interpretation of its own law or procedure." *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989).

Assuming there was a state evidentiary rule violation, the Sixth Circuit has said:

> Our review of state court evidentiary rulings is extremely limited. "[E]rrors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually not to be questioned in a federal habeas corpus proceeding." *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988); *see also Lundy v. Campbell*, 888 F.2d 467, 469-70 (6th Cir. 1989) (deference should be accorded state court determinations of whether due process was denied by trial errors), *cert. denied*, 110 S.Ct. 2212 (1990). Such errors will result in the granting of a writ of habeas

> corpus only if they result "in the denial of fundamental fairness, thereby violating due process." *Cooper, supra*, 837 F.2d at 286.

Waters v. Kassulke, 916 F.2d 329, 335 (6th Cir. 1990). In making the determination whether any errors are fundamentally unfair, the "errors are to be considered 'within the context of the entire record.'" *Id.*, quoting *Payne v. Janasz*, 711 F.2d 1305, 1310 (6th Cir.) *cert. denied*, (1983).

On direct appeal in this case, the Ohio Supreme Court found no violation of its procedural and evidentiary rules. *State v. Mapes*, 19 Ohio St. 3d at 111-12 (1985):

> Crim. R. 11(B)(2) and Evid. R. 410 prohibit only the admission of a no contest plea. These rules do not prohibit the admission of a conviction entered upon that plea when such conviction is made relevant by statute. The trial court was correct in admitting the evidence of the prior conviction as it was not equivalent to the admission of the no contest plea and it was not introduced by the prosecution for any purpose other than establishing the specification. The purpose of Evid. R. 410 as it relates to criminal trials is to encourage and protect certain statements made in connection with plea bargaining and to protect the traditional characteristic of the no contest plea which is avoiding the admission of guilt that is inherent in pleas of guilty. See 1 Weissenberger, Ohio Evidence (1985) 55, Section 410.1 and Advisory Committee Notes to Fed. R. Evid. 410. These purposes are not disserved by the admission of a conviction entered upon a no contest plea.
>
> The issue of the applicability of Evid. R. 410 and Crim. R. 11(B)(2) aside, we note that the United States Supreme Court has authorized admission of

prior convictions and pleas of no contest in death penalty cases, *Gregg v. Georgia* (1976), 428 U.S. 153, and the majority rule that convictions entered on pleas of no contest are admissible to establish enhanced penalties. See Annotation (1963), 89 A.L.R. 2d 540, 610. Thus, we hold that Crim. R. 11(B)(2) and Evid. R. 410 do not preclude admission of a conviction entered upon a no contest plea to prove a prior murder specification under R.C. §2929.04(A)(5). Petitioner's claim of a due process violation is not well taken.

Summary

None of the grounds relating to the guilt phase are well taken. The petition should be denied as to the conviction of aggravated murder.

III. The Sentencing Phase
A. Same Jury for Both Phases (Ground 11)

Petitioner challenges the constitutionality of Ohio Revised Code §2929.03, which calls for a unitary jury, i.e., the same jury hears the guilt phase and, if necessary, the sentencing phase. Petitioner contends that since the jury was death-qualified, it was more likely to convict and be punitive in the sentencing phase, which violated rights to due process, a fair and impartial jury, effective assistance of counsel, equal protection, and an arbitrary and capricious imposition of death.

The Supreme Court has upheld unitary death qualified juries. *Lockhart v. McCree*, 476 U.S. 162 (1986); *see also Buchanan v. Kentucky*, 483 U.S. 402 (1987) The state has a significant interest in a scheme wherein the same jury is used for the guilt and penalty phases of a trial. *Buchanan*, 483 U.S. at 419, citing *Lockhart*, 476 U.S. at 182. Finally, the

Court noted that death qualification was necessary to constitute a jury that could find the facts and apply the law at both the guilt and sentencing phases. *Buchanan*, 483 U.S. at 415. The Court stated in *Lockhart:*

> [T]he removal for cause of "*Witherspoon*-excludables" serves the state's entirely proper interest in obtaining a single jury that could impartially decide all of the issues.... We have upheld against constitutional attack the Georgia capital sentencing plan which provided that the same jury must sit in both phases of a bifurcated capital murder trial, *Gregg v. Georgia*, 428 U.S. 153, 158, 160, 163 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), and since then have observed that we are "unwilling to say that there is any one right way for a State to set up its capital sentencing-scheme." *Spaziano, v. Florida*, 468 U.S. 447, 464 (1984).
>
> * * *
>
> Another interest identified by the State in support of its system of unitary juries is the possibility that, in at least some capital cases, the defendant might benefit at the sentencing phase of the trial from the jury's "residual doubts" about the evidence presented at the guilt phase.... Finally, it seems obvious to us that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase; if two different juries were to be required, such testimony would have to be presented twice, once to each jury. As the Arkansas Supreme Court has noted, "[s]uch repetitive trials could not be consistently fair to the State and perhaps not even to the accused." *Rector, supra*, at 396, 659 S.W.2d, at 173.

476 U.S. at 180-81.

Petitioner's claim that O.R.C. §2929.03 is unconstitutional is without merit.

III.B. Ineffective Assistance of Trial Counsel (Ground 1)

Petitioner's claim of ineffective assistance of trial counsel must be considered in the context of whether appellate counsel was ineffective in not raising the issue on appeal, thus constituting cause for the state procedural waiver of this claim. See section I.B., *supra*.

Petitioner asserts counsel failed to adequately investigate and prepare mitigation evidence. In support, he submits three affidavits, one from an attorney and two from mitigation specialists (petitioner's appendix, PA, 12, 16). Their affidavits do not submit evidence, as opposed to allegations, that trial counsel was ineffective. The affidavits also do not demonstrate prejudice.

The Balske affidavit (PA 12) states counsel failed to investigate petitioner's life history which allegedly would have allowed counsel to "present persuasive mitigating evidence" (*id.*, ¶11.b), and counsel failed to "present mitigating evidence" (*id.*, ¶11.d.). This affidavit assumes, but does not demonstrate, that there was mitigating evidence.

The Schorr affidavit (PA 16a) states counsel failed to "develop completely the defendant's life history" (*id.*, ¶7). Moreover, "based on my own independent investigation," information concerning petitioner "exists which could have served as a basis for a productive mitigation" (*id.*, ¶15). The alleged mitigation evidence is not set forth.

The Core affidavit (PA 16b) states that counsel failed to collect the necessary records or conduct the necessary

interviews to develop a life history and "strategy for mitigation...." (*Id.*, ¶¶5, 6) This affidavit fails to demonstrate there was evidence in existence which would have produced a strategy superior to that utilized by counsel.

The conclusory allegations of the affidavits are insufficient to show a hearing is necessary, *see Pagan*, 984 F.2d at 64.

Petitioner asserts counsel inadequately researched the circumstances of his prior New Jersey murder conviction, thus did not present and develop evidence that Mapes had not been the triggerman. At the sentencing trial, petitioner submitted his unsworn testimony that he was not the triggerman in the New Jersey murder (Tr. 4051-57). The prosecution rebutted with the sworn testimony of Rodney Newton, petitioner's co-defendant, who stated that Mapes told him in 1983 that he was the triggerman (Tr. 4083).

Any additional evidence that counsel should have presented concerning who was the New Jersey triggerman became irrelevant when the trial court foreclosed the jury from considering it as mitigation, with this instruction:[3]

> **The mitigating factors do not apply to the prior murder conviction at all.** I might say that this is the aggravating circumstances that he was found guilty of when he waived the jury to me. And you are here to compare any mitigating circumstances that you find in this case with that aggravating circumstance.

Tr. 4216-17 (emphasis supplied). Thus, no prejudice resulted from counsel's alleged failure to investigate and develop

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[3] The constitutionality of this instruction is considered in section III.D., *infra*.

evidence relating to whether petitioner was the triggerman in the New Jersey homicide.[4]

Petitioner's remaining arguments need only be briefly mentioned. The jury was not misled or misinstructed in the sentencing phase as to the function of the firearm specification or the number of aggravating circumstances, thus counsel was not ineffective for failing to make an objection. See section III.C., *infra*. The jury was not misinstructed as to their verdict being a recommendation. *Id.* The jury was not given an acquittal-first jury instruction as to whether to recommend the death penalty or impose a life sentence. *Id.* The fact that lead counsel was representing another client in another case does not, in and of itself, show his representation of Mapes was ineffective.

Petitioner has not shown that trial counsel was ineffective at the sentencing phase, thus has not shown that appellate counsel was ineffective in failing to raise this issue on direct appeal. Accordingly, petitioner has not shown cause or prejudice to excuse the state procedural waiver of this claim.

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[4] New counsel has proffered affidavit evidence, some of it of doubtful admissibility, obtained in early 1987, that Mapes was not the New Jersey triggerman. Petitioner's two co-defendants in the New Jersey murder signed affidavits identifying co-defendant Hampton as the triggerman in the New Jersey murder (PA 18, 19). Newton, petitioner's co-defendant in the case *sub judice*, signed an affidavit recanting his triggerman testimony at the sentencing trial (PA 17). Three New Jersey police officers signed affidavits that the relevant New Jersey police report "indicates" Hampton was the triggerman. The police report was not attached (PA 20a, 20b, 21). Petitioner has not shown whether due diligence in 1983 would have obtained this evidence. Certainly Newton's recantation would have been doubtful.

III.C. Jurors' Diminished Sense of Responsibility (Ground 3)

As noted earlier, Section I.B., *supra*, ground 3 is waived unless cause and prejudice is established. Thus, petitioner must establish ineffective assistance of appellate counsel for not raising this claim.

Petitioner alleges that statements made to the jury by the court and counsel misinformed them and diminished their sense of responsibility, in violation of the Fifth, Eighth, and Fourteenth Amendments. Specifically, petitioner contends that constitutional violations arose because: (1) the trial judge repeatedly told the jury their sentencing verdict was only a recommendation; (2) the trial judge led the jury to believe the gun specification was an aggravating circumstance; (3) the jury was given an "acquittal first" jury instruction relative to their sentencing recommendation and (4) the trial judge and prosecutor attempted to impress on the jury that they had no discretion in making their sentencing recommendation. These claims are without merit, thus appellate counsel was not ineffective for failing to raise them.

Mapes' counsel did not object to many instructions during trial. Under Ohio law, the failure to object to a jury instruction is a waiver of that claim of error upon appeal, unless the improper jury instruction was a "plain error," such that but for the error the outcome of the trial clearly would have been otherwise. *State v. Underwood*, 3 Ohio St. 3d 12, 13 (1983). Thus, unless the alleged improper instructions were "plain error," appellate counsel was barred from raising the issue and was not ineffective.

Petitioner contends that advising the jury that any verdict to impose the death penalty would only be a recommendation

was plain error, relying on *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In that case, the Supreme Court found it impermissible to suggest to a jury that the appellate court would review its decision and thus bore the responsibility for determining the appropriateness of the death penalty. Unlike the Mississippi statute in that case, the Ohio statute provides that if the jury determines the aggravating circumstances outweigh the mitigating factors, it "shall recommend to the court that the sentence of death be imposed on the offender." Ohio Revised Code §2929.03(D)(2). The court then independently reviews the evidence, and if the aggravating circumstances outweigh the mitigating factors, the court imposes the death sentence. Ohio Revised Code §2929.03(D)(3). If, however, the jury finds that the mitigating factors outweigh the aggravating circumstances, it must recommend a life sentence,, which is binding upon the court. Ohio Revised Code §2929.03(D).

The jury was correctly advised of this Ohio law on two separate occasions. Tr. 503-04, 4183-85. Since under Ohio law the jury does in fact only recommend the death penalty, there was no *Caldwell* violation. *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1101 (6th Cir. 1990), *cert. denied sub nom., Scroggy v. Kordenbrock*, 499 U.S. 970 (1991) (applying Kentucky law) (In order to make out a *Caldwell* violation, there must be some affirmative misstatement misleading the jury as to its role; emphasizing that the jury is only making a "recommendation" to the judge is not sufficient.)[5] There was no misstatement of the jury's role.

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[5] Petitioner relies in part on *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), which found a *Caldwell* violation where the judge told the jury repeatedly during *voir dire* that their verdict was only a recommendation, and that he, the judge, made the final decision. That was found to be a mischaracterization of Florida law because the Jury's sentence may only be rejected by the judge if the facts are

Petitioner contends the trial court treated the firearm specification as an aggravating circumstance and erroneously instructed the jury in accordance therewith. Clearly the court understood during the sentencing phase that the only aggravating circumstance was the prior murder conviction for a purposeful killing, and the jury was instructed accordingly. The judge told the jury the firearm specification was irrelevant to the sentencing phase of the trial. (Tr. 4033) The jury was told repeatedly that the only aggravating circumstance to be weighed against any mitigating evidence they found was the prior conviction for a purposeful killing. Tr. 4045, 4057, 4131-33, 4149-50, 4172-74, 4178, 4180-81, 4227-28. There is no indication the jury might have believed that the gun specification was an aggravating circumstance to be weighed during the sentencing phase.

Petitioner contends that the court used an improper "acquittal-first" jury instruction when it instructed:

> Now, as I have indicated, if all twelve jurors find by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, that is the aggravating circumstances which he was found guilty, Specification 4 in each count, then you must return a finding to the Court.
>
> I instruct you, as a matter of law, that if you make such finding then you have no choice and must recommend to the Court that the sentence of death be imposed on the defendant, David Mapes.

"so clear and convincing that virtually no reasonable person could differ." *Id.* at 1529. Thus, under those circumstances, the crucial role of the jury was diluted. There was no dilution of the jury's role in this case.

* * *

> On the other hand, if after considering all of the relevant evidence raised at trial the testimony, the other evidence, the unsworn statement of David Mapes, the evidence of the State of Ohio, and the arguments of counsel, you find that the State of Ohio failed to prove that the aggravating circumstances which the defendant, David Mapes, was found guilty of committing outweigh the mitigating factors, then you will return your verdict reflecting your decision. That is, you must unanimously find that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances of which the defendant was found guilty of committing outweigh the mitigating factors. In this event you will then proceed to determine which of two possible imprisonment sentences to recommend to the Court. Your recommendation to the Court shall be one of the following:
>
> > (1) That David Mapes be sentenced to life imprisonment with parole eligibility after 30 full years of imprisonment, or
> >
> > (2) That David Mapes be sentenced to life imprisonment with parole eligibility after 20 full years of imprisonment. Tr. 4183-85.

Petitioner contends this instruction was an illegal "acquittal first" instruction under Ohio law, since it required the jury to "ballot first on the question of death and reach a unanimous verdict in favor of petitioner before they could even begin deliberating on either of the life verdicts." Traverse at 27. He quotes the following from *State v. Thomas*, 40 Ohio St. 3d 213 (1988), *cert. denied*, 493 U.S. 826 (1989) (paragraph 3 of syllabus):

> A jury must unanimously agree that the defendant is guilty of a particular offense before returning a verdict of guilty on that offense. If a jury is unable to agree unanimously that a defendant is guilty of a particular offense, it may proceed to consider a lesser included offense upon which evidence has been presented. The jury is not required to determine unanimously that the defendant is not guilty of the crime charged before it may consider a lesser included offense.

Thomas suggested juries be instructed that if they are unable to agree upon a charge, they begin considering the lesser included offense. *Id.* at 220-21.

Guilt and death eligibility had already been decided in Mapes' case. The jury had only one issue left to decide: whether the mitigating factors outweighed the aggravating circumstance of a prior murder conviction. In the lesser included offense context, the jury has at least two issues: (1) whether defendant is guilty of the charged offense, and (2) whether defendant is guilty of the lesser included offense. *Thomas* does not apply. Petitioner's claim is not well taken.

Petitioner contends that the trial judge and prosecutor attempted to impress on the jurors that they had no discretion in making their sentencing recommendation, citing Tr. 4183. The court instructed the jury:

> Now, as I have indicated, if all twelve jurors find by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, that is the aggravating circumstances which he was found guilty, Specification 4 in each count, then you must return a finding to the Court.

> I instruct you, as a matter of law, that if you make such finding then you have no choice and must recommend to the Court that the sentence of death be imposed on the defendant, David Mapes.

Tr. 4183. This is an accurate statement of the law under Ohio Revised Code §2929.03(D)(2).

These instructions were not plain error. Petitioner has not shown cause and prejudice for the state procedural default.

III.D. Ineffective Assistance of Appellate Counsel (Ground 2)

Petitioner raises claims of ineffective assistance of appellate counsel, one of which is well taken.

1. Precluding Mitigating Factors

Petitioner asserts one meritorious claim, that counsel was ineffective in failing to raise on appeal the issue that the following instruction during the sentencing phase was unconstitutional:

> **The mitigating factors do not apply to the prior murder conviction at all.** I might say that this is the aggravating circumstances that he was found guilty of when he waived the jury to me. And you are here to compare any mitigating circumstances that you find in this case with that aggravating circumstance.

(Emphasis supplied.) Tr. 4216-17. Petitioner's counsel objected to this instruction (Tr. 4212-4214).

It is reasonably probable that the underlined portion of the quoted instruction deprived petitioner of a constitutional right. In *Eddings v. Oklahoma*, 455 U.S. 104 (1981), the

Supreme Court held that the Eighth Amendment requires consideration of the character and record of the accused as being constitutionally indispensable to the process of inflicting the death penalty. *Eddings* noted that prior law "recognizes that 'justice ... requires ... that there be taken into account the ... character and propensities of the offender.'" *Id.* at p. 112. *Eddings* explicitly adopted the plurality opinion in *Lockett v. Ohio*, 438 U.S. 586 (1978), which stated the rule as follows:

> [W]e conclude that the Eighth and Fourteenth Amendments require the sentencer ... not be precluded from considering, **as a mitigating factor,** any aspect of a defendant's character or record..that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (emphasis in original).

The Supreme Court applied this principle to a fact situation similar to the case *sub judice*, in *Sumner v. Schuman*, 483 U.S. 66 (1987). In 1958, Schuman had been convicted of first degree murder and sentenced to life imprisonment without the possibility of parole. In 1975, while serving his sentence, he was convicted of capital murder for killing a fellow inmate. Nevada law mandated that he be sentenced to death by reason of his prior conviction, irregardless of the circumstances surrounding the prior conviction.

Sumner applied *Lockett* and *Eddings*, and held "that the Eighth and Fourteenth Amendments require that the sentencing authorities be permitted to consider any relevant mitigating evidence before imposing a death sentence." *Id.* at p.76. The mere fact Schuman was serving a sentence of life in prison without possibility of parole "does not specify for what offense the inmate received a life sentence nor does

it permit consideration of the circumstances surrounding that offense or the degree of the inmate's participation." *Id.* at 80. The Court further noted, at 81:

> Past convictions of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant deserves to be sentenced to death for a later murder, but the inferences to be drawn concerning an inmate's character and moral culpability may vary depending on the nature of the past offense. The circumstances surrounding any past offense may vary widely as well. Without consideration of the nature of the predicate life-term offense and the circumstances surrounding the commission of that offense, the label "life-term inmate" reveals little about the inmate's record or character. **Even if the offense was first-degree murder, whether the defendant was the Primary force in that incident, or a nontriggerman like Schuman, may be relevant to both his criminal record and-his character** [emphasis supplied].

Thus, the Eighth and Fourteenth Amendments required that the jury be permitted to consider any evidence regarding the details of Mapes' New Jersey conviction. When the court instructed the jury that "[t]he mitigating factors do not apply to the prior murder conviction at all," it erroneously ruled as a matter of law that the jury could not consider the mitigating claims of petitioner's youth, that he was not the triggerman, and that his sentence was the equivalent of a manslaughter conviction rather than a murder conviction (Tr. 4050-51).

As a general rule, errors in instructions of a trial court to a jury in a state criminal trial are not reviewable in federal habeas corpus proceedings. They are not constitutional errors unless they are so fundamentally unfair as to deprive

petitioner of a fair trial and to due process of law. Undesirable, erroneous or even universally condemned instructions may survive due process scrutiny. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Long v. Smith*, 663 F.2d 18 (6th Cir. 1981), *cert. denied*, 455 U.S. 1024 (1982). In reviewing state court instructions on a claim of constitutional error, the alleged unconstitutional language must be considered within the context of overall instructions, *Cupp v. Naughten*, 414 U.S. 141 (1973). An omission, or incomplete instruction, is less likely to violate due process than is a misstatement of law, *O'Guin v. Foltz*, 715 F.2d 397, 399 (6th Cir. 1983). Placing the erroneous instruction in context reveals the following.

Before trial began on the sentencing phase, the court preliminarily instructed the jury as to the appropriate law, including the mitigating factors set forth in Ohio Revised Code §2929.04(B)(1) through (7). (Tr. 4031-35) The seventh factor broadly permitted the jury to consider "any other factors that are relevant to the issue of whether the offender should be sentenced to death." (Tr. 4035) The court also informed the jury (Tr. 4035):

> The law provides that the offender be given great latitude in the presentation of evidence of the factors listed that I have just read to you, listed above, and any other factors in mitigation of the imposition of the sentence of death.

Petitioner submitted the following evidence through an unsworn statement to the jury (Tr. 4050-51):

> I was arrested in 1972 for a homicide case where a man was shot in his place of business by another man.... There was no robbery involved in it and from what I did, I understand that he had an argument previous to that. I wasn't there during the time that the

argument happened, but I was there during the time that the man was shot, and because of that I was convicted of murder, but the county prosecutor allowed me to plead to a *non vult* so that I could get a sentence of eight to ten years, which is a manslaughter. But I had to cop out to a *non vult* to the indictment of murder.

That is why it still stands that in '72 I was convicted of murder instead of manslaughter.

I was 18 at the time and I had turned 18 three weeks prior to the incident. I was not the trigger man nor did I have a gun in my possession at that time. And I regret the fact that it happened as well as this, too.

I had no control over either circumstances. That is all I have to say.

Petitioner supplemented that statement a short while -later (Tr. 4065-66):

Q. Mr. Mapes, did you request of me [defense counsel] to make a motion to the Court on May 11, 1983, before the Jury heard any testimony?

Mr.Nugent (prosecutor]: Objection.

A. Yes.

Q. You did?

A. Yes.

Q. And will you tell the jury what that request, through the motion, was to the Court in chambers?

A. I requested that I be sentenced to life imprisonment without parole.

Q. What was the basis of that motion?

A. To have the jury not go through the trial.

Following the evidence, the court gave final instructions to the jury prior to deliberations (Tr. 4172-80). The court again set forth the seven mitigating statutory factors found in section §2929.04(B). (Tr. 4179-80) The court also instructed (Tr. 4180):

> You will be called upon to decide the factual question as to whether or not the defendant in the original trial and in this hearing, in the first phase, produced evidence as to any one of those statutory factors that I have just read to you or any other non-statutory factor, that is whether the defendant has met the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death.

After deliberating for a period of time, the jury submitted two questions to the judge. He responded to those questions in open court as follows (Tr. 4216-17):

Now, as to the first question, which reads as follows:

> Are we [the jury] just to consider evidence presented to us in the sentencing hearing or testimony and evidence from both the trial and sentencing hearing as regarding the mitigating factors?

Of course, this is the fourth time I have explained this orally to you. If you find from all the evidence at the sentencing hearing and at the trial that the defendant has gone forward with some evidence of mitigation, and you find that the evidence exists as to the mitigation, then you are to consider it.

The next question reads:

Does the 7 mitigating factors as it applies to SPEC 4 cover this case and the prior conviction?

I have at least three times explained this to you.. You are required to accept without reservation the fact that the defendant was convicted in 1972 of murder. And an essential element of which was the purposeful killing of another.

The mitigating factors do not apply to the prior murder conviction at all. I might say that this is the aggravating circumstances that he was found guilty of when he waived the jury to me.. And you are here to compare any mitigating circumstances that you find in this case with that aggravating circumstance [emphasis supplied].

After further deliberations, the jury submitted two additional questions to the court. The court instructed, in part, as follows (Tr. 4326):

This means that the defendant, at this particular hearing has to produce evidence, some evidence of mitigating factors. If the defendant doesn't produce any evidence and the only evidence you have from the defendant is the statement of the defendant, and if you find mitigating factors, fine, and if you don't, you don't have any mitigating factors.

The jury resumed deliberations, then submitted one further question. It requested a copy of petitioner's prior statement. The statement (4050-51, 4065-66) was read to the jury. (Tr. 4233-36)

Placing the erroneous instructions in context with all of the instructions shows that initially the trial judge gave the jury wide latitude in considering mitigating evidence and factors. However, it appears from the jury question which gave rise to the erroneous supplemental instruction that the jury did not know, despite the wide latitude given to it, the circumstances surrounding the prior New Jersey conviction were to be considered in terms of mitigation.[6]

The court's response that the "mitigating factors do not apply to the prior murder conviction at all" instructed the Jury as a matter of law they were precluded from considering the circumstances surrounding the prior conviction. This meant, among other exclusions, the jury could not consider petitioner's age (three weeks past his 18th birthday) when he committed the murder, .could not consider whether he was the triggerman, and could not consider whether the sentence, hence the conviction, for murder was really equivalent to one for manslaughter.

Placing the erroneous instruction in context, shows it was emphasized by reason of the specific jury question which gave rise to it. There is a reasonable probability that if counsel had, consistent with petitioner's objection at trial, raised the issue of the erroneous instruction on appeal, the

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[6] Perhaps this was due to counsels' final arguments. The prosecutor argued that whether Mapes was the triggerman in the New Jersey case was not relevant (Tr. 4161-72). Petitioner argued it was a mitigating factor (T. 4132-41).

result of the appeal would have been different. Petitioner is entitled to relief on this ground.

2. Other Errors

Petitioner also contends appellate counsel was ineffective for failing to raise the issue of trial court bias or prejudice under a state standard which is similar to the constitutional standard. This was considered in section II.D., *supra*.

Petitioner's contention that appellate counsel was ineffective for failing to raise the issue of an improper jury poll is considered in section III.E, *infra*.

Petitioner contends that appellate counsel was ineffective in the manner in which grounds 4 and 5 were briefed. Appellate counsel did sufficiently raise the issues before the appellate court. Assuming inadequate briefing, petitioner cannot satisfy the prejudice prong of *Strickland* because, as discussed *infra*, see Sections III.G. and III.H., the grounds are without merit. This claim of ineffective assistance of counsel is without merit.

In summary, petitioner's claim that appellate counsel was ineffective is without merit, except with respect to counsel's failure to raise the issue of the erroneous instruction that precluded the jury from considering the circumstances of petitioner's prior New Jersey conviction.

III. E. Improper Jury Poll (Ground 7)

Petitioner contends that the response of one of the jurors, June Chatman, to the jury polling called into question the unanimity of the death sentence verdict. It will be analyzed in the context of whether ineffective assistance of appellate counsel constituted cause for the state procedural default in failing to raise this claim on appeal. See section I.B., *supra*.

The jury poll is provided for under Rule 31(D) of the Ohio Rules of Criminal Procedure:

> Poll of Jury. When a verdict is returned and before it is accepted the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged.

See also, Ohio-Revised Code §2845.77.

The trial court read the death recommendation as to each of the two aggravated murder counts (Tr. 4237-38), "We, the jury recommend that the sentence of death be imposed on the defendant, David Mapes." (Tr. 4237-38) The court then polled the jury:

> The Court is going to ask this question as it relates to Count 1 and Count 2 by way of polling the jury. The question I am going to ask you is, is this your verdict, and if it is you say, yes.
>
> Alan B. Srp?
>
> MR. SRP: Yes.
>
> THE COURT: Amie Hayner?
>
> MRS. HAYNER: Yes.
>
> THE COURT: John A. Fawcett?
>
> MR. FAWCETT: Yes, sir.
>
> THE COURT: Dennis Sykora?

MR. SYKORA: Yes.

THE COURT: June Chatman. June Chatman.

MRS. CHATMAN: This is the verdict?

THE COURT: The one that we just read.

MRS. CHATMAN: Yes.

THE COURT: Londell Smith.

MR. SMITH: Yes.

THE COURT: Vicki L. Britting.

MRS. BRITTING: Yes.

THE COURT: James Specian?

MR. SPECIAN: Yes.

THE COURT: Betty Barrish.

MRS. BARRISH: Yes.

THE COURT: Ernest Toth.

MR. TOTH: Yes.

THE COURT: John Watson.

MR. WATSON: Yes.

THE COURT: Mary Buntura.

MRS. BUNTURA: Yes.

THE COURT: The court has polled the jury on Count One and Two.

Is there anything further from the prosecutor?

MR. NUGENT: No, sir.

THE COURT: Anything further for the defendant?

MR. CARLIN: Yes, we would like the jury re-polled, your Honor.

THE COURT: The Court is going to re-poll you as to whether or not this is your verdict, the verdicts that were just read in the courtroom.

Alan B. Srp.

MR. SRP: Yes.

THE COURT: Amie Hayner.

MRS. HAYNER: Yes.

THE COURT: John A. Fawcett?

MR. FAWCETT: Yes.

THE COURT: Dennis Sykora.

MR. SYKORA: Yes.

THE COURT: June Chatman..

MRS. CHATMAN: I have to say yes or no?

THE COURT: Yes, you have to say yes or no. It is yes or no. Did you sign these?

MRS. CHATMAN: I signed them, yes.

MR. CARLIN: Objection, your Honor. Could we ask whether or not these were her verdicts?

THE COURT: Are these your verdicts, Mrs. Chatman?

MRS. CHATMAN: It's to me, it's the State's verdict

THE COURT: Wait a second. Please be seated, Mr. Carlin. Did you sign this verdict?

MRS. CHATMAN: Yes, I did.

THE COURT: Okay.

Londell Smith, please.

MR. CARLIN: Objection, your Honor. It is not whether she signed it, is it her verdict?

THE COURT: Please be seated. It is sufficient for this Court.

Londell Smith, please.

MR. SMITH: Yes.

THE COURT: Vicki L. Britting.

MRS. BRITTING: Yes.

THE COURT: James Specian.

MR. SPECIAN: Yes.

THE COURT: Betty Barrish.

MRS. BARRISH: Yes.

THE COURT: Ernest Toth.

MR. TOTH: Yes.

THE COURT: John Watson.

MR. WATSON: Yes.

THE COURT: Mary Buntura.

MRS. BUNTURA: Yes.

Tr. 4238-4242.

To summarize, in the first poll, juror Chatman clearly and unequivocally said "Yes" to the question. In the second poll, she equivocated.

The Ohio Supreme Court has upheld the acceptance of a verdict where two jurors first indicated in open court dissent from the verdict more strongly than did Mrs. Chatman. *Emmert v. State*, 127 Ohio St. 235, 236-387 (1933), held:

> While undoubtedly the court in this circumstance would have been warranted in sending the jury back to its room for further deliberation, we cannot say that there was error in receiving the verdicts. **Neither of**

these two jurors denied that the verdicts were hers. [Emphasis supplied.] Although both indicated somewhat unsettled states of mind, both, after prolonged discussion in the jury room, had signed the verdicts, and each in open court, after full opportunity to say otherwise, said that the verdicts were still hers. No coercion or undue pressure on the part of the trial judge appears. After discussing this feature of the case, the Court of Appeals said:

> "We have no hesitancy, therefore, in deciding that the trial court rightfully accepted the verdicts upon the completion of the polling, as being the true ascertainment by all the members of the jury of the question submitted for their determination, namely, whether the defendant was or was not guilty.
>
> In this judgement of the Court of Appeals we likewise concur.

This case is similar to *Emmert*. Juror Chatman signed the verdict after prolonged jury deliberation and said it was her verdict. Her answers in the second poll did not deny it was her verdict. The trial judge was present and observed Chatman's demeanor in finding she concurred in the verdict. As in *Emmert*, the court may have been warranted in sending the jury back, but it cannot be said there was error in receiving the verdict.

Insofar as petitioner claims a violation of due process, that claim is without merit. In *Hatcher v. Jackson*, 853 F.2d 212, 212 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989), one juror broke into tears during the jury poll, immediately after stating that it was her verdict: "Yes - I can't go through this, I can't do it, I can't. I can't -." *Hatcher* held that the federal court should defer to the state court's exercise of

discretion in determining that its procedural rules were satisfied and that the Juror had responded affirmatively to the jury poll. The court found there was no due process violation.

Neither prong of the *Strickland* test has been met. It cannot be said that an attorney of reasonable competence would have raised the issue on appeal. If it had been raised, there was not a reasonably probability it would change the outcome of the appeal. Appellate counsel was not ineffective for failing to raise the jury poll issue, thus petitioner has not established cause and prejudice for the state procedural waiver of this claim.

III.F. Death Sentence Based Upon Imputed Intent (Ground 5)

Petitioner contends that his death sentence is unconstitutional because he did not possess "the intent necessary to sustain the aggravated murder conviction," rather it is based on the imputed intent of another. (SAP at p.75) Petitioner relies primarily on *Enmund v. Florida*, 458 U.S. 782 (1982), which held the Eighth Amendment requires that one cannot be sentenced to death "who does not himself kill, attempt to kill, or intend that a killing took place, or that lethal force will be employed," *id.* at 797.[7] The jury found that petitioner had the intent to kill as demonstrated from the following.

The two aggravated murder counts, Counts 1 and 2, alleged in part that petitioner "unlawfully and purposely caused the death of another.... (PA 1) The instructions to the jury stated in part that aggravated murder is the "purposeful killing of another while committing or attempting to commit

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[7] *Enmund* has been modified by *Tison v. Arizona*, 481 U.S. 137 (1986).

or while fleeing immediately after committing or attempt to commit aggravated robbery in the first count and aggravated burglary in the second count." (Tr. 3675) The jury was instructed that to find petitioner guilty, they had to find, beyond a reasonable doubt, among other elements, "that the killing was done purposely and with specific intent." (Tr. 3676) The court defined "purpose" and "purposely." It instructed that a "[p]urpose to kill is an essential element of the crime of aggravated murder in the first and second counts." *Id.* The court continued (Tr. 3676-77):

> A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendant, David Mapes, a specific intention to kill John Allen while the defendant was committing or attempting to commit or while fleeing immediately after committing or attempting to commit aggravated robbery in the first count.

The court instructed on what constitutes purpose (Tr. 3677):

> Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally, but not accidentally. Purpose and intent mean the same thing here.

The instructions tracked Ohio law, see Ohio Revised Code S2901.22(A). It is evident that the jury found petitioner possessed the intent to kill, which satisfies *Enmund, supra.*

The evidence supported the finding of the jury. As noted in *Mapes,* 19 Ohio St. 3d at 112:

> Unlike *Enmund*, the evidence viewed most favorably to appellant places him at the killing with gun in hand and all the evidence presented supports the finding that the appellant was the triggerman. Further,, unlike *Enmund*, the jury in the instant case found that appellant "unlawfully and purposely caused the death" of Allen.

Petitioner's claim that he only had imputed intent, as opposed to the requisite intent to kill, is not well taken.

III.G. Meaningful Appellate Review (Ground 4)

Petitioner's fourth ground alleges he was denied his right to meaningful appellate review. As noted in section I.B., *infra*, he waived this claim.

Summary

The claims of petitioner concerning the death sentence are, except for one, without merit. One allegation of ineffective assistance of appellate counsel is well taken, i.e., counsel's failure to appeal the erroneous jury instruction, given over trial counsel's objections, that "[t]he mitigating factors do not apply to the prior murder conviction at all.... " The court should grant a writ of habeas corpus unless the state affords Mapes an opportunity to present his appeal to the appropriate Ohio state court, within 90 days, for its consideration, on the merits, of the above issue of ineffective assistance of appellate counsel as if it were properly and timely presented. *See Mayo v. Henderson*, No. 566, 93-2446, 1994 WL 2035 (2nd Cir. Jan. 3, 1994); *see also Evans v. Clarke*, 868 F.2d 267 (8th Cir. 1989).

RECOMMENDATION

It is recommended that the petition for a writ of habeas corpus concerning the conviction of petitioner be denied. It is recommended that the petition for a writ of habeas corpus concerning the death sentence be conditionally granted as noted above.

Dated: Feb. 24, 1994

Jack B. Streepy
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).